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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON *and* TAKERU KAMIYAMA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

INTRODUCTION 1

A. There Could Be No Better Case for Deciding When the Constitution Entitles an Accused to Bench Trial 2

B. Granting Certiorari Will Also Present a Valuable Opportunity to Assure Compliance With the Religion Clauses in Cases That Turn on the Allocation of Church Property 5

C. The Government's Unveiling of New Theories of Guilt Underscores the Importance of Assuring That the Basis for Criminal Tax Liability Be Clearly Settled in Advance 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases PAGE

Cole v. *Arkansas*, 333 U.S. 196 (1948) 6

James v. *United States*, 366 U.S. 213 (1961) 8, 9, 10

Korematsu v. *United States*, 323 U.S. 214 (1944) 5

Kolender v. *Lawson*, 103 S.Ct. 1855 (1983) 9

Larson v. *Valente*, 456 U.S. 228 (1982) 8

Press-Enterprise Co. v. *Superior Court*, 104 S.Ct. 819 (1984) 3

Sandstrom v. *Montana*, 442 U.S. 510 (1979) 6

Singer v. *United States*, 380 U.S. 24 (1965) 2, 3

United States v. *Ballard*, 322 U.S. 78 (1944) 4

United States v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974) 9

United States v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *petition for cert. filed*, No. 83-1297 (Feb. 6, 1984) 9

United States v. *Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc) 9

Widmar v. *Vincent*, 454 U.S. 263 (1981) 8

Constitutional Provisions

United States Constitution
Amendment I ..... *passim*
Amendment V ..... *passim*
Amendment VI ..... *passim*

Statutes and Rules

Fed.R.Crim.P. 23(a) 2

INTRODUCTION

The government uses fully half its brief to make what amounts to a jury summation to this Court. The government's factual assault seeks to convey an image of a Watergate-style cover-up of tax crimes triggered by the initial tax investigation itself. *See, e.g.*, Opp. 12 n.8, 30 n.37. It clearly hopes thus to convince the Court that this is hardly a case in which any due process or first amendment protection for "good faith" religious leaders (Opp. 30 n.37) need be proclaimed. This image, however, is as false as it is irrelevant.

First, this prosecution was precipitated *not*, as the government claims, by a "massive and undisputed effort to deceive the tax authorities" (Opp. 30), but rather, as the trial judge found, by a tax audit triggered by "Moon's status as a highly visible, religious leader" (App. 35). Had Reverend Moon been less controversial, the trial judge expressly concluded, this investigation would have been less likely. *See* A536-37; Pet. 27 n.52. *Second*, what the government portrays as a massive "cover-up" was simply an understandable attempt by loyal followers of Reverend Moon to construct documents and "shuffl[e] around . . . papers here and there" to memorialize prior transactions "to conform . . . to the[ir] lawyer's view of American tax laws." T5522 (Goettel, J.). And the massive "deception" the government dramatizes consisted simply of mistakes in that reconstruction *not* about the key fact that the funds came from church sources, but about whether they came by cash or by check, from abroad or from the streets of America. *See* note 4 *infra*.

Such mistakes may be regrettable, but they do not prove what the government tells this Court: namely, that the entire Unification Church movement for which Reverend Moon contends he held the assets was conjured up in hindsight to justify Reverend Moon's non-payment of taxes. Evidence that this movement "existed" long before the "cover-up," and that Reverend Moon acted as its trustee, is indeed ample in the record. *See* note 7 *infra*.

In any event, invocation of the "cover-up" evidence before this Court is simply beside the point. For the true issues raised here are whether the defense was wrongly left to the mercy of an improper factfinder, which in turn

was impermissibly left to apply novel and improper rules. Indeed, the "cover-up" is most relevant here, if at all, as a reminder of the danger of permitting the government to pursue religious figures, secure in the knowledge that it may hand-pick the most favorable tribunal, invite that tribunal to wink at a religion's own allocations of property and authority, and make up its law as it goes along. For any government so omnipotent could keep *every* religious group on the run, forcing each to leave a paper trail —designed to meet the changing demands of those in power—that, on the government's theory, would never be "clean" enough for the plight of such groups to merit this Court's attention. It is no surprise, therefore, that dozens of religious groups support a grant of certiorari to consider the questions that this case clearly poses even if the government succeeds in giving a sinister cast to the facts the jury heard at trial.

Certiorari should be granted to vindicate the primacy of fairness as the criterion for choosing between jury trial and bench trial, and to assure religious groups that their informal financial arrangements will not be caught in nets the prosecution is free to cast as it sees fit.

A. There Could Be No Better Case for Deciding When the Constitution Entitles an Accused to Bench Trial.

Opposing petitioners' argument that this is the ideal case for deciding when due process may entitle an accused to a bench trial, the government suggests only that this issue has long been foreclosed from further inquiry by this Court. It argues that, under a "well-settled" "general principle," a defendant has no right "to insist upon bench trial" (Opp. 13), while the government has a "right to insist upon a jury trial" under Rule 23(a) (Opp. 16). This argument cannot be squared with *Singer* v. *United States,* 380 U.S. 24 (1965), or any other decision of this Court. *Singer* plainly rested *not* on any "general principle" that the *prosecution* has a right to insist on *jury* trial, but rather on the general principle, rooted deeply in our Constitution and not merely in a rule of procedure, that a criminal *defendant* has a right to a *fair* trial —a right that, as an historical matter, jury trial had been

most likely to vindicate. *Id.* at 34-37. No asserted prosecutorial "right" could possibly outweigh that right. For, as this Court recently reiterated, "[*n*]*o* right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co.* v. *Superior Court,* 104 S.Ct. 819, 823 (1984).

It is thus of critical importance to the administration of criminal justice to decide whether the prosecution's insistence on trying a gravely unpopular defendant by jury may violate the Fifth Amendment right to fair trial. This issue was explicitly left open in *Singer. See* Pet. 11. The government's wish to dodge this issue as "infrequently litigated" (Opp. 13) must fail since its significance cannot be measured by counting the published opinions on the matter. Nor is there any reason to suppose that resolution of this issue would in fact have narrow rather than "general importance" (*see* Opp. 30). On the contrary, concern that due process was violated by the forced jury trial in this case has been powerfully voiced in this Court by an array of groups especially concerned with protecting defendants who face analogous intense popular hostility in a wide variety of contexts—*e.g.,* the Southern Christian Leadership Conference (SCLC), the American Civil Liberties Union (ACLU), the National Emergency Civil Liberties Committee (NECLC), the Spartacist League, and the Institute for the Study of American Religion (ISAR).

The bench trial issue is thus a uniquely appropriate one for review by this Court—provided it is fairly presented here. The government suggests it is not, relying on the findings of both courts below that the jury, while biased, met the minimum standard of impartiality that this Court, in order to prevent rampant dismissals, has applied when defendants *demand* jury trial under the Sixth Amendment. Opp. 15; *see* Pet. 12-13. But those findings cannot foreclose the bench trial issue here because, even if correct, they are simply irrelevant to the Fifth Amendment due process claim of defendants who seek to *waive* jury trial. *See* Pet. 12-13; *see also Amicus* Briefs of the ACLU, NECLC, ISAR. The government offers not one word of analysis to refute this conclusion. Indeed, as the government nowhere denies, the Fifth Amendment bench trial issue presented here could arise *only* in a case where, as

here, a jury *could* be empaneled that would satisfy the minimum Sixth Amendment standard. For if a circumstance ever arose in which such a jury could *not* be empaneled, any well-counseled defendant would not voluntarily seek a trial before a judge, but would insist on a jury trial and demand to have his case dismissed. *See* Pet. 12-13; *Amicus* Brief of ACLU at 6 n.3.

Not only is the bench trial issue thus fairly presented here, but this case is a particularly well-suited vehicle for its review. *First,* petitioners' contention that bench trial would have been fairer here than jury trial is unusually well-grounded in light of the trial judge's identical conclusion.[1] *Second,* the record in this case forecloses any confident conclusion that a judge would have reached the same result the jury did.[2] Thus the government's flat denial that imposition of a jury trial could ever be a "penalty" (*see* Opp. 17) is unfathomable. *Third,* the reasons the government explicitly gave for insisting on jury trial here, far from being "legitimate" (Opp. 17), were, under the circumstances, absurd. *See* Pet. 14-16.[3] In particular, the

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[1] *See* Pet. 4-5 & n.5. Nothing in petitioners' argument turns on the presence or the absence of any "formal . . . 'findings' " by the district court regarding the relative fairness of bench and jury trial, as the government wrongly suggests (*see* Opp. 15-16 & n.11).

[2] After all, this jury was a cross-section of a public nearly half of which acknowledged that, given the chance, it would "throw Reverend Sun Myung Moon in jail". *See* Pet. 4 n.4. Despite the government's contrary "assum[ption]" (Opp. 18 n.14), the imposition of this jury did prevent petitioners from presenting "a full and accurate picture of Reverend Moon's religious relationship to those who gave him the assets" (Pet. 7; *see Amicus* Briefs of National Council of Churches *et al.* at 11-17; Bishop Unterkoefler *et al.* at 6-7; The Freemen Institute at 4, 8-9). The trial judge himself acknowledged as much when he remarked after conviction that a picture of Reverend Moon as his religion's messiah "would have been disastrous to [present] before a jury." S60. Petitioners' entire defense was in fact constrained in an attempt to avoid "be[ing] sent to jail because a jury in a hostile environment [might find their religious] teachings false," *United States* v. *Ballard,* 322 U.S. 78, 87 (1944). Thus no one can know what a trial of this case before a judge would even have looked like, much less what its outcome would have been.

[3] One government reason—to "defuse the public criticism that had been leveled by Moon" (App. 7)—also transgressed First Amendment values. But nothing whatever in petitioners' bench

government could not, as it claims, have projected to the public the "appearance of fairness" (Opp. 17) by *denying* petitioners the very tribunal they desperately sought and forcing them to appear instead before a tribunal the petitioners were confident harbored irreducible hostility. To be sure, a public that predominantly despises a defendant may well "better accept the results of [such] a jury trial" (*see* Opp. 17)—provided it results in conviction. But no such public satisfaction has ever been blessed by this Court. There is truly "no precedent" (*see* Opp. 16) for the government's self-interested surmise (Opp. 17) that the public would think a bench trial disturbingly unfair. Certiorari is essential to ensure that such a surmise cannot suffice as a pretext for the government to obtain the more favorable rather than the fairer tribunal.

B. Granting Certiorari Will Also Present a Valuable Opportunity to Assure Compliance With the Religion Clauses in Cases That Turn on the Allocation of Church Property.

The need for such assurance is created by the holding below that Religion Clause cases "do not serve as precedent in federal criminal tax prosecutions" (App. 30)—a holding that will, unless set aside, "li[e] about like a loaded weapon ready for the hand of any authority" willing to invoke it. *Korematsu* v. *United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting). The government offers no innocent interpretation of that ruling. It says only that "good" religions need have no fear (*see* Opp. 30 n.37) since the gun will not go off at *them*, and that the gun did not go off even at these petitioners, as their religion was "scrupulous[ly]" not considered "for them or against them" at their trial (*id.*). Such reassurance may be acceptable in a criminal case where religion has no bearing on the defense. But as the government concedes, "th[is] whole case turned on" Reverend "Moon's relationship to the Unification Church" (Opp. 23), and the *only* evidence introduced as to the *source* of the assets, as Judge Oakes found, was that they "came to Moon largely from members of his faith"

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trial argument turns on the presence or absence of an *independent* First Amendment violation here, as the government wrongly suggests. *Compare* Opp. 16-17 *with* Pet. 14-15.

(App. 65). *See, e.g.*, T2164, 2770, 3117-20, 3124-25, 4280-84, 4605-08.[4]

Given this evidence, what counts for constitutional purposes, as this Court held in *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979), is whether the jury "could well have interpreted" the instructions in an unconstitutional manner.[5] Here, the jury surely *could* have interpreted them the way petitioners, Judge Oakes, and many *amici* did. Specifically, the jurors could have decided that, even if the assets *had* come from church members,[6] the jury need not consider whether or how those donors wished to restrict use of the assets in Reverend Moon's hands (*see* App. 70). These jurors, after all, had heard that Reverend Moon "brainwashes" church members, that his "cult" thinks him "a god," and the like. *See* Pet. 4 n.4. They could well have decided that, whatever these "Moonies" intended for their church money, it was *really* Moon's because the ways he used it did not strike *them* as "constitut[ing] a religious use or purpose" (App. 30)—a judgment the court below delegated to the jury (*id.*). Or the jurors could have decided the money was really Moon's because real church money would more likely be placed in an entity with a "specific organizational structure" (App. 68 n.3), than given to Moon to hold for the church

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[4] Contrary to the government's suggestion, there was *no* evidence that the assets came from "petitioner Moon's international and domestic business activities" (Opp. 5); nor did the government ever make that argument to the jury (*see* T6222-24, misleadingly cited at Opp. 6 n.2). Indeed, the government's "theory of the case" at trial was that the funds came mostly from members' collections "on the streets" (T5520-21, Goettel, J.); and although the government now conjectures that the jury "disbelieve[d]" that theory (Opp. 18), literally *nothing* in the record contradicts Judge Oakes' conclusion that the assets came from church sources.

[5] The claim that the "second and third questions presented are not properly raised on this record" (Opp. 18) because petitioners waived their objections to the instructions (Opp. 18-19 n.16, 25) is nonsense, flatly foreclosed by portions of the record the government conveniently omits to cite. *See* T6119, 6121, 6123, 6129-31, 6157-59, 6531-37, 6650, 6656, 6663, 6664, 6666, 6667, 6677.

[6] Due process would preclude affirming this conviction on the new ground that the assets came not from church members but from an alternate source such as "business activities" (*see* note 4 *supra*). *See Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948).

movement.[7] So much for the right of a church to make its *own* decisions about how it should be organized and what should be done with its resources.[8]

To reassure the several State *amici* that this disregard of church donors' intent will not undermine enforcement of charitable trusts, the government says States can still rely on that intent to prosecute a religious leader like Reverend Moon "for embezzlement or diversion of trust funds" (Opp. 29 n. 35) if he should ever treat those funds as his own against the donors' wishes. In the meantime, *federal* authorities can tax the leader as though his use of the assets were *not* in fact so restricted.[9] True, the government concedes, it would not so treat a *political* leader who held "campaign contributions" under his name, dominion and control. Opp. 28 n.33. For a politician would enjoy the presumption that such contributions would be unavailable for his "unrestricted personal use"—even absent any direct evidence of donors' intent to that effect. *Id.*; *see* Pet. 24 n.45. But *religious* leaders, the government inexplicably proclaims, are different; they enjoy no such presumption. Opp. 28 n.33.

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[7] The remarkable assertion that the movement was an afterthought, and that there was a "total absence of any direct contemporaneous evidence" of its existence (Opp. 10), is flatly contradicted by the record. Not only did a church official testify that in "early . . . 1973" Reverend Moon had told him, in reference to the Chase funds, "that the money was coming from our movement overseas and was to be put into an account here to be used for the work of our International Church" (T4089-90); but documentary evidence shows that at least by the outset of 1974, Reverend Moon was being formally addressed by public officials as the head of the "Unification Church International" (*see* AA2, AA3, AA5, *see also* DXAA1, AA4). Indeed, a letter from then-President Nixon, on White House stationery, dated December 11, 1973, addresses Reverend Moon with that title.

[8] On threats to church ministries implicit in the decision below, *see Amicus* Briefs of Catholic League at 6; Church of Latter-Day Saints at 7; American Ass'n. of Christian Schools at 1-2, 5, 10-11; American Coalition of Unregistered Churches *et al.* at 10; Center for Judicial Studies at 18; Senator Orrin Hatch at 13-14.

[9] Although the government now suggests Reverend Moon might have "appropriated . . . power" over church assets "without consent of the putative donors" (Opp. 29), no such diversion was alleged or proved (*see* App. 72 Oakes, J.). To affirm on this new theory would again violate due process. *See* note 6 *supra*.

Whether this "rule" for religion, announced for the first time in the Brief in Opposition on April 9, 1984, is good for Reverend Moon only or for *all* religious leaders is left to the Court's imagination. If the former, there is a denominational preference violative of the Establishment Clause. *Larson* v. *Valente*, 456 U.S. 228 (1982). If the latter, there is a discrimination against religious speech violative of the Free Speech Clause. *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Should the Court agree to hear this case, the government may choose between those positions —or attempt to formulate yet another. But, should this Court decline review, the many for whom this case has caused concern will rightly wonder who the next victims of the government's cavalier approach, sanctioned by both courts below, will be.

C. The Government's Unveiling of New Theories of Guilt Underscores the Importance of Assuring That the Basis for Criminal Tax Liability Be Clearly Settled in Advance.

The government completely misses the thrust of the third Question Presented[10] when it challenges petitioners to show that, despite the jury's finding of willfulness, the "asserted uncertainty in law . . . affect[ed] their conduct." Opp. 24. Petitioners do maintain that they were affirmatively misled by the well-settled tax rules previously applicable to funds gratuitously transferred to a representative of a cause.[11] The presence or absence of such reliance, however, is irrelevant to the rule, traceable to *James* v. *United States*, 366 U.S. 213 (1961), that the basis for criminal liability must be clearly defined *before* the alleged crime has been committed. The central purpose of the *James* rule, wholly independent of protecting surprised innocents, is to prevent zealous prosecutors from shaping

[10] As to the government's frivolous suggestion that the question is not "properly raised" (Opp. 18, 25), *see* note 5 *supra*.

[11] Petitioners had always supposed that such funds were presumed to be held on behalf of the cause without regard to evidence of intent to create a "trust" as such, and that such funds were not taxable to the representative unless and until used personally. Pet. 23-26. Consistent with that supposition, Reverend Moon paid tax on assets he personally used (Pet. 20-21 n.34)—a fact the government does not deny.

"crimes" to fit those they would accuse—thereby engaging in low-visibility discriminatory prosecution. *See* Pet. 26-27 & nn.51-52 (invoking, *inter alia, Kolender* v. *Lawson*, 103 S.Ct. 1855, 1858-59 (1983)). That purpose, to which the government does not even refer, has nothing at all to do with the defendant's state of mind—which is precisely what the Fourth Circuit held in *United States* v. *Critzer*, 498 F.2d 1160, 1162 (1974), the Fifth said in *dictum* in *United States* v. *Garber*, 607 F.2d 92, 98 (1979) (en banc), and the Ninth held in *United States* v. *Dahlstrom*, 713 F.2d 1423, 1428 (1983), *cert. pending*, No. 83-1297.[12] Since the government treats the Second Circuit as having held the contrary here (*see* Opp. 24 n.25), an important conflict among the circuits is squarely presented.

Each time the government—whether below or in this Court, *see* notes 4, 6, 9 and page 8, *supra*—has redefined the tax principle that Reverend Moon supposedly violated when he treated the assets entrusted to him as church property, it has underscored the importance of a ruling by this Court clarifying the *James* line of cases.[13] Because *Dahlstrom* is too limited a vehicle for that purpose, *see* Pet. Supp. Brief (April 5, 1984), this case should be heard on the merits in tandem with *Dahlstrom*—or alone.[14]

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[12] The government indefensibly asserts that the *James* rule is inapplicable to an accused's defense. Opp. 29-30. Even if that were so, to withhold the presumption that petitioners had always supposed was available would plainly affect the government's burden, not just the defense.

[13] Several of the *amici* likewise express concern at the novel and *ad hoc* nature of the criteria used below to permit a jury to find the income at issue taxable to Reverend Moon. *See, e.g., Amicus* Briefs of Coalition for Religious Freedom *et al.* at 7-10; Bishop Unterkoefler *et al.* at 13-20; Spartacist League at 12, 16, 22; States of Hawaii, Oregon and Rhode Island at 5-12.

[14] The distinction between the fair notice aims of the *James* line of cases, and the anti-discrimination purposes served in those cases, is badly blurred in a case like *Dahlstrom*, where the very illegality claimed by the government was the concoction of sham transactions whose sole purpose was tax evasion. In that context, whether the government had made up a new crime, and whether the accused's actions were not willful, turn out to be the same question. In *Moon*, however, the supposed "effort to deceive the tax authorities by document fabrications, false explanations, and perjury" by followers of Reverend Moon (Opp. 30 n.37) all came after, and were independent of, the alleged illegality of Reverend Moon's

Indeed, it is hard to imagine a better context for clarifying this important area than one in which the risk of discriminatory enforcement threatens religious minorities (*see* Pet. 26-27), and in which—as the government has been unable to deny—the Court would have before it the *only* criminal tax conviction in the quarter century since *James* to be affirmed over a dissent as to the underlying theory of the income's taxability to the accused.

CONCLUSION

At bottom, it is the *rule of law* that the prosecution and conviction in this case challenge. At stake is whether government should be able to pick the more favorable rather than the fairer tribunal, free the factfinder of First Amendment inhibitions, and even shape the law itself to fit the accused. Few matters could more clearly merit this Court's plenary attention.

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conduct in treating certain assets as church property for purposes of his 1973, 1974 and 1975 tax returns. In this context, a jury might reason backwards from subsequent cover-up to initial willfulness, even if the rules making the underlying conduct objectively illegal were *not* in fact sufficiently settled in advance to meet due process standards. Only if the Court has this type of case before it can the most basic confusion of the *James* line be sorted out. Ironically, therefore, the nature of the cover-up alleged in this case argues *for* rather than *against* a grant of certiorari.

Respectfully submitted,

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